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Client Alert

Global Human Capital and Compliance

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The Right to Disconnect: A Comparative Analysis

The line between 'work' and 'home' has historically been clear for most employees – separated by a distinct office building, worksite, or retail space. Technology has blurred this line in the past few decades and, for some employees, COVID-19 and the advent of flexible working removed it entirely.

In response, some governments around the world have recognized a 'Right to Disconnect'. The form of this entitlement and how it is enforced can differ greatly. We explore the new Right to Disconnect in Australia and the more established framework in France.

THE RIGHT TO DISCONNECT IN AUSTRALIA

1. What exactly is the Right to Disconnect?

Under the legislation, an employee 'may refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable'. An employee's right of refusal also extends to contact from a third party if the contact or attempted contact relates to the employee's work.

The legislation sets out a list of non-exhaustive factors that must be considered when determining whether the employee's refusal is unreasonable, including the employee's compensation and the nature of the employee's role and responsibilities.

2. Who does the Right to Disconnect apply to and when did it come into effect?

The Right to Disconnect applies to all employees currently covered by the *Fair Work Act 2009* (Cth) (**FW Act**), including employees of private sector employers. The Right to Disconnect came into effect on 26 August 2024 for most employees (and will come into effect on 26 August 2025 for employees of small business employers).

3. How is the Right to Disconnect enforced?

The Right to Disconnect is explicitly a 'workplace right' for the purposes of Australia's adverse action regime. This means that employers cannot take adverse action (including dismissal) because an employee has, has exercised, or proposes to exercise their Right to Disconnect or to prevent the employee from exercising their Right to Disconnect. Employees are able to bring adverse action claims in the Fair Work Commission, Federal Circuit and Family Court, or Federal Court on the basis of the Right to Disconnect.

In addition, employers and employees can both make an application to the Fair Work Commission to resolve disputes regarding whether an employee's reliance on the Right to Disconnect is reasonable. The Fair Work Commission can then make an Order to resolve the dispute, including an order to prevent the employee from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contact or to prevent the employer from continuing to require the employee to monitor, read or respond to contact or attempted contact.

In the event an Order is breached, civil penalties under the FW Act can apply.

LE DROIT À LA DÉCONNEXION IN FRANCE

The Right to Disconnect has existed under French legislation since 2016. While not defined in legislation, in practice, the Right to Disconnect covers the right of employees not to answer calls or check, read or answer emails or other solicitations outside of working hours or reasonable working schedules.

The protection initially covered executive employees receiving a set salary and no overtime payments (regardless of the size of the employer). In addition, employers with more than 50 employees are required to include the Right to Disconnect as a mandatory topic for annual negotiation with unions on 'professional equality and quality of life at work'. In the absence of an agreement, employers are obliged to set up a charter, after consultation with the works council, to implement the right.

Items to be inserted in the collective agreement or in the charter include:

- identification of context and risks;
- measures or tools to ensure that employees can disconnect (for example, blocking of e-mail messages outside of business hours or reminders in e-mail signatures that emails do not require immediate answers);
- preventive measures such as organizational adjustments to adapt workloads or work assignments to employees' standard working hours or working time periods (for example, a rule to not set meetings before or after certain times);
- training and awareness-raising initiatives for employees and management on the reasonable use of digital tools (for example, regular reminders of the measures provided by the charter, especially when it is identified that employees are reading/answering emails after their working hours, during weekends or while on leave); and
- monitoring procedures to assess the effectiveness of these measures.

Risks and Sanctions

There are no express sanctions regarding non-compliance with the Right to Disconnect (except in relation to mandatory negotiation where a company employs more than 50 employees).

However, non-compliance with the Right to Disconnect can lead to potential liabilities for companies, for example - in relation to overtime payments and the interruption of employees' rest periods (checking emails during weekends qualifies as working time and should be duly compensated as such). Non-compliance with the Right to Disconnect can also create high risk in the context of job burn-out or 'professional exhaustion', which can be recognized as professional accidents or diseases.

KEY TAKEAWAYS FOR EMPLOYERS

Adjusting to the Right to Disconnect (and the nuances of how it is implemented in each country) is likely to be essential for global companies moving forward. Several countries, including Ireland, Spain, Portugal and Italy, already have protections or restrictions in this area, and an increasing number of countries seem likely to introduce some variation on the Right to Disconnect in the near future, including the UK where the new Labour government has promised to introduce a 'right to switch off' using a Code of Practice model.

Our experience in France, where the rules have been in place for some time, is that complying with this right is achievable, but requires employers to proactively manage the employee relationship and set expectations including on issues such as 'timely responses' and employee availability across time-zones. In Australia, the Fair Work Commission's management of any initial applications should be monitored to obtain a better understanding of how the new right will be applied and interpreted in practice. King & Spalding is well placed to advise given our experience in other locations which are already managing within similar rules, in addition to our specific Australian expertise.